

**No. 50019-1-II**

IN THE COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

LILLIAN SHILLING, Appellant

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APPEAL FROM THE SUPERIOR COURT  
OF KITSAP COUNTY  
THE HONORABLE JUDGE WILLIAM HOUSER

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BRIEF OF APPELLANT

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## I. ASSIGNMENT OF ERROR

- A. The evidence was insufficient to sustain a conviction for bail jumping.

### ISSUE PERTAINING TO ASSIGNMENT OF ERROR

- A. Ms. Shilling was charged with one count of bail jumping.

Where no evidence shows she was not present at 9 a.m. on the specified date, was the State's evidence insufficient to support the conviction for bail jumping?

- B. If the State substantially prevails on appeal, should this court deny costs under RAP 14.2 and 15.2(f) ?

## II. STATEMENT OF FACTS

### Procedural Facts

Kitsap County prosecutors charged Lillian Shilling, as an accomplice, with one count of delivery of a controlled substance. CP 8-9. She was released on a \$5,000 bail. CP 87, 94. The court set the omnibus hearing for January 26, 2016, and a trial date of February 16, 2016. CP 7.

At the February 16<sup>th</sup> hearing Ms. Shilling's attorney was in another trial; she was represented by stand-in counsel. 2/16/16 RP 2. The court reset the trial date for March 14<sup>th</sup>. 2/16/16 RP 2-3.

At the March 14<sup>th</sup> hearing Ms. Shillings attorney was again in another trial and she was represented by stand-in counsel. The court set a new trial date of April 11, 2016, and told Ms. Shilling to appear on that date. 3/14/16 RP 2-3; CP 13; 97.

On April 11, 2016, Ms. Shilling's attorney was not present, but she was again represented by stand-in counsel. 4/11/16 RP 2; CP 101. Ms. Shilling was not present when the courtroom was polled at 12:11 p.m. CP 101. The court issued a bench warrant. 4/11/16 RP 2; CP 103.

At the next hearing, to quash the warrant, April 14, 2016, Ms. Shilling's attorney was not present. 4/14/16 RP 2. Stand-in counsel told the court she thought Ms. Shilling had looked at the expiration of speedy trial rather than the actual trial date. 4/14/16 RP 2. The court quashed the bench warrant and reset a trial date to July 5, 2016. RP 14.

The State amended the charges to include one count of bail jumping. CP 28. Ms. Shilling pleaded not guilty. 1/30/17 RP 4-5. For a variety of reasons, the trial was continued until January 30, 2017. CP 15-17; 6/1/16 RP 3-5; 8/19/16 RP 6-7.

### Trial Evidence

The State presented several witnesses concerned with the delivery of a controlled substance charge. Vol. 2RP 33- Vol. 3RP 249. The jury found Ms. Shilling not guilty of the charge. CP 59.

To support the bail jumping allegation, the state introduced several documents as exhibits. Exhibits 1-3, 6-9, CP 86-103. These documents indicated that Ms. Shilling was to appear in court on April 11, 2016 at 9:00 a.m. CP 97,99. There was also a clerk's minutes entry indicating Ms. Shilling was not present for the courtroom poll at 12:11 pm on April 11, 2016. CP 101.

Ms. Schulman, the stand-in attorney for Ms. Shilling in March 2016, testified she handled hearings for both the nine o'clock and ten-thirty calendar hearings, five days per week. Vol. 2 RP 311. When she appeared at omnibus or trial call hearings, she was usually covering for another attorney, and simply asking for a continuance. Vol. 2RP 311. On April 11<sup>th</sup>, she expected it would be a short hearing asking the court for a continuance. Vol. 2RP 320-321.

On average, she handled up to ten cases a day. Vol. 2RP 312. On busy mornings, if there were many cases on the docket, a

nine o'clock in the morning case might not be called until later. Vol. 2RP 317.

She testified that if an individual was in the courtroom with a disruptive child, they might be asked to leave the courtroom. Vol. 2RP 317. While she had no specific recollection of the March 14<sup>th</sup> or April 11<sup>th</sup> hearings when she represented Ms. Shilling, she remembered that Ms. Shilling had brought her child to court several times. Vol. 2RP 317.

The jury found Ms. Shilling guilty of bail jumping. CP 59. Ms. Shilling was found indigent and she makes this timely appeal. CP 76-79.

### III. ARGUMENT

#### A. The Evidence Was Insufficient To Sustain A Conviction For Bail Jumping.

Due process requires the State to prove beyond a reasonable doubt all facts of the charged crime. *State v. W.R., Jr.*, 181 Wn.2d 757, 761-62, 336 P.3d 1134 (2014); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). To determine the sufficiency of the evidence, the test is whether, "after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the

crime beyond a reasonable doubt.” *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014) (internal citation omitted). All reasonable inferences from the evidence are drawn for the State and viewed most strongly against the defendant. *Id.* at 227.

The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *State v. Colquitt*, 133 Wn.App. 789, 796, 137 P.3d 892 (2006).

To prove the charge of bail jump, the State had to show beyond a reasonable doubt that Ms. Shilling was charged with a felony and “released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance: before the court and that she then failed to appear. RCW 9A.76.170(1),(3). Bail jumping requires proof “that the defendant has been given notice of the required court dates and *was absent at the specific time at which she was notified the hearing would occur.* *State v. Fredrick*, 123 Wn.App. 347,353, 97 P.3d 47 (2004); *State v. Coleman*, 155 Wn. App. 951, 964, 231 P.3d 212 (2010) *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011).

In *Coleman*, the Court determined the evidence was insufficient to convict Coleman of bail jumping. Coleman had been



ordered to appear at 9:00 in the morning. The clerk's minutes indicated that Coleman was not present for an 8:30 am status hearing. His hearing was stricken and the defendant was placed on warrant status. *Id.* at 963. The appellate Court reversed the conviction, holding the evidence did *not* show he failed to appear at the time indicated on his notice. *Id.* at 963.

Similarly, here the evidence was insufficient to prove beyond a reasonable doubt that Ms. Shilling failed to appear in court at the specific time at which she was notified the hearing would occur. The State presented evidence she received notice she was to appear in court at nine o'clock in the morning. The only evidence presented by the State was that she was not in the courtroom at 12:11 p.m. when her name was called. There was no evidence she did not appear at nine o'clock, or that she was not outside in the hallway with her child.

Because the evidence here is insufficient, the conviction for bail jumping should be reversed.

#### B. Appellate Costs Should Be Denied

Ms. Shilling asks this court to exercise its discretion not to award costs if the State substantially prevails on appeal. Rule of

Appellate Procedure (RAP) 14.2 permits clerks or commissioners to waive the imposition of appellate costs if an adult offender does not have the current or likely future ability to pay such costs. The finding of indigency by the trial court, for purposes of appeal, remain in effect on appeal, per RAP 15.2(f):

A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

In *State v. Sinclair*, the Court of Appeals concluded that where appellate costs in a criminal case is raised in the appellant's brief or on a motion for reconsideration, it is appropriate for the reviewing Court to exercise its discretion and consider it. *State v. Sinclair*, 192 Wn.App. 380, 382, 367 P.3d 612 (2016). The *Sinclair* Court reasoned that exercising discretion meant inquiring into a defendant's ability or inability to pay appellate costs. *Sinclair*, 192 Wn.App. at 392. If a defendant is indigent and lacks the ability to pay, an appellate court should deny an award of costs to the State. *Sinclair*, 192 Wn.App. at 382.

The costs of appeal are added to the fees imposed by the trial court. The Washington Supreme Court recognized the widespread “problematic consequences” legal financial obligations (LFOs) inflict on indigent criminal defendants, which include an interest rate of 12 percent, court oversight until LFOs are paid, and long -term court involvement, which inhibits re-entry into the community and increases the chance of recidivism. *State v. Blazina*, 182 Wn.2d 827, 836, 344 P.3d 680 (2016).

Here, Ms. Shilling was found indigent and entitled to appellate review at public expense. Under *Sinclair* and RAP 15.2(f), this Court should presume that she has remained indigent, and decline to impose any appellate costs that the State may request.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Shilling respectfully asks this Court to reverse her conviction for insufficient evidence.

Respectfully submitted this 18<sup>th</sup> day of September 2017.

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Attorney for Appellant

## CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Lillian Shilling, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid, on September 18, 2017 to:

Lillian Shilling  
4350 East Q Street  
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And I electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the Kitsap County Prosecuting Attorney (at [kcpa@co.kitsap.wa.us](mailto:kcpa@co.kitsap.wa.us)).

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**September 18, 2017 - 8:33 AM**

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